United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2131

To be argued by
LYNN W.L. FAHEY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CHAUNCEY REIDOUT, :

Petitioner-Appellee, :

Docket No. 76-214

-against- :

:

ROBERT HENDERSON, Superintendent of
Auburn Correctional Facility, :

Respondent-Appellant. :

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P/S

BRIEF FOR PETITIONER-APPELLEE

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK GRANTING A PETITION FOR A WRIT OF HABEAS CORPUS.

WILLIAM E. HELLERSTEIN
WILLIAM J. GALLAGHER
Attorneys for Petitioner-Appellee
15 Park Row - 18th Floor
New York, New York 10038
[212] 577 - 3420

LYNN W. L. FAHEY
Of Counsel

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STATUTES INVOLVED

New York Penal Law, Section 160.15. Robbery in the first degree:

A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

* * *

4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

Robbery in the first degree is a class B felony.

New York Penal Law, Section 160.10. Robbery in the second degree:

A person is guilty of robbery in the second degree when he forcibly steals property and when:

* * *

2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

* * *

(b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

Robbery in the second degree is a class C felony.

New York Penal Law, Section 25.00. Defenses; burden of proof:

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

UNITED STATES COURT OF APPEALS
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CHAUNCEY REIDOUT, :

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-against- :
:

ROBERT HENDERSON, Superintendent of
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Respondent-Appellant. :

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PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York (Hon. Marvin E. Frankel), dated October 13, 1976, which granted petitioner's application for a writ of habeas corpus and held that Section 160.15(4) of the New York Penal Law violates due process in accordance with the decision in Mullaney v. Wilbur, 421 U.S.684 (1975).

By order of Hon. William H. Timbers dated November 11, 1976, this appeal was consolidated with the appeal in Farrell v. Czarnetzky [76 Civ. 2355], since both appeals involved the constitutionality of Penal Law Section 160.15(4).

QUESTION PRESENTED

Whether New York Penal Law Section 160.15(4), under which Petitioner was convicted, violates due process because it places the burden of proof on the accused as to the elements which distinguish robbery in the first from robbery in the second degree -- whether the weapon used was loaded and operable.

STATEMENT OF FACTS

Petitioner was indicted for robbery in the first degree, grand larceny in the second degree and possession of a weapon in connection with a forcible theft of property from Arneta Walker during which he allegedly "displayed what appeared to be a pistol, revolver or other firearm" [Indictment No. 3642/73]. Miss Walker testified that petitioner raped and robbed her at gunpoint,* and the People introduced petitioner's wallet, which had been found in the area of the crime. The defense presented three witnesses as well as photographs to establish that petitioner's appearance at the time of the crime was dissimilar to Miss Walker's descriptions of her assailant.

The weapon which Miss Walker said was held by her assailant was never introduced into evidence, and no evidence was presented as to whether or not it was either loaded or operable.

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* A rape charge was dismissed prior to indictment.

At the close of the People's case, the court denied defense counsel's motion to dismiss the charge of robbery in the first degree, which was made on the ground that there was no evidence that a real or operable gun had been used (117-118).*

Defense counsel subsequently requested a jury charge that in order to convict petitioner of robbery in the first degree the "People must prove the fact that the defendant had had an operable gun capable of firing a shot. I don't believe there was any evidence of that." (224). Defense counsel also requested that the court charge robbery in the second degree, because there was no evidence that "there was in fact a real weapon used." (224-225). The court pointed out that the wording of the Penal Law sections which set forth robbery in the first and second degrees are identical except that under robbery in the first degree an affirmative defense is available regarding the operability of the weapon and that petitioner did not raise that affirmative defense during the course of the trial (225-226).

The court then charged robbery in the first and third degrees, but refused to charge robbery in the second degree. As to robbery in the first degree, it instructed the jury

* Numbers in parentheses refer to pages of the trial transcript.

that "it is sufficient . . . if the victim is made to believe that the object was such a weapon." (250). During its deliberations, the jury returned to seek clarification of the charge of robbery in the first and third degrees, and the court again so charged (276). Thereafter, the jury found petitioner guilty of robbery in the first degree (290).

On May 29, 1974, petitioner was sentenced to an indeterminate prison term with a maximum of fifteen years and a minimum of five years.

A year after petitioner's conviction, Mullaney v. Wilbur, 421 U.S.684 (1975) was decided by the Supreme Court. The issue of the constitutionality of the New York robbery statute was thereafter raised by petitioner in the Appellate Division, which affirmed petitioner's conviction without opinion on November 13, 1975 [50 A.D.2d 726]. It was also raised as a ground for granting leave to appeal to the New York Court of Appeals before Judge Sol Wachtler, who denied leave on February 4, 1976.

On August 26, 1976, petitioner filed a petition for a writ of habeas corpus [76 Civ. 3836] in the United States District Court for the Southern District of New York, alleging that the New York robbery statute deprived him of due process of law under the Fourteenth Amendment. On October 13, 1976, Judge Frankel granted the petition and ordered

petitioner released unless he was retried or resentenced within sixty days. In his opinion, Judge Frankel found himself to be in disagreement with Judge Metzner's decision in Farrell v. Czarnetsky, which had upheld the constitutionality of the New York robbery statute on August 4, 1976. He concluded instead that:

> ... the doctrine of Mullaney v. Wilbur, supra, is squarely controlling, and that the device of an affirmative defense here in question is invalidated by that controlling authority. Here, as in Mullaney, the procedural arrangement, with the transferring of a weighty burden of proof to the defendant, "denigrates the interests found critical in Winship." 421 U.S. at 684. The matter is not to be resolved by manipulating "elements" of offenses or determining whether we deal with a single crime or two. Id. at 698-699. We are commanded to deal with "substance rather than ... formalism." Id. at 699. Applying these principles ... this court concludes that the writ should issue.

ARGUMENT

NEW YORK PENAL LAW SECTION 160.15(4), UNDER WHICH PETITIONER WAS CONVICTED, VIOLATES DUE PROCESS BECAUSE IT PLACES THE BURDEN OF PROOF ON THE ACCUSED AS TO THE ELEMENTS WHICH DISTINGUISH ROBBERY IN THE FIRST FROM ROBBERY IN THE SECOND DEGREE -- WHETHER THE WEAPON USED WAS LOADED AND OPERABLE.

Section 160.15(4) of the New York Penal Law requires a defendant accused of robbery in the first degree to prove, by a preponderance of the evidence as an affirmative defense, that the gun allegedly used in the course of the robbery was unloaded or inoperable, in order to reduce the crime to robbery in the second degree. It therefore violates the Fourteenth Amendment's due process mandate that the People prove beyond a reasonable doubt every element of the crime charged.

Thus Judge Frankel was correct in finding the statute unconstitutional, and his order granting petitioner's habeas corpus petition should be affirmed.

The due process clause of the Fourteenth Amendment requires that the prosecution prove beyond a reasonable doubt "every fact necessary to constitute the crime" charged. In re Winship, 397 U.S. 358 (1969). In Mullaney v. Wilbur, 421 U.S.684 (1975), the Supreme Court made it clear that when a state differentiates between two degrees of a crime by imposing substantially different penalties, the due process requirement that the People prove every necessary fact beyond a reasonable doubt applies to the fact which distinguishes the higher degree of the crime from the lower. That requirement cannot be circumvented by presuming the existence of the differentiating factor and casting the burden of proving its non-existence upon the accused as an affirmative defense.

Under the Maine statute which the Supreme Court unanimously struck down in Mullaney v. Wilbur, a defendant was guilty of murder if he unlawfully killed another with "malice aforethought;" and of manslaughter if he did so "in the heat of passion on sudden provocation." If the prosecution established the intentional and unlawful nature of the killing, malice aforethought was conclusively implied unless the defendant proved by a fair preponderance of the evidence that

he acted in the heat of passion. The Supreme Court found that Maine imposes substantially more severe penalties -- a longer period of imprisonment -- upon conviction of murder than upon conviction of manslaughter; and that Maine's placing of the burden of proof on the accused as to the factor which differentiated between the two degrees of homicide (the existence vel non of "heat of passion") thus could result in the more severe penalty when it is "as likely as not that he deserved a significantly lesser sentence." Mullaney, supra, at 703. Therefore, it held that the Maine statute violated due process when it differentiated between murder and manslaughter "while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns." Mullaney, supra, at 698.

Section 160.15(4) of the New York Penal Law, under which appellant was convicted, provides that a robber is guilty of robbery in the first degree if he "displays what appears to be a pistol, revolver, or other firearm." The accused can, however, reduce the crime to robbery in the second degree [P.L.§160.10(2)(b)] if he proves, as an affirmative defense by the preponderance of the evidence [P.L.§25.00(2)], that the firearm was unloaded or inoperable. Thus the New York statute violates due process in precisely the same way as the Maine statute held unconstitutional in Mullaney. It distinguishes between two degrees of a crime -- robbery in the first and second degrees -- on

the basis of whether or not the weapon used was loaded and operable. Then, like the Maine statute, it effectively presumes the existence of those facts, and requires the accused to come forward and prove their non-existence.

Indeed, the revision of Penal Law Section 160.15 which resulted in the present statute was designed for the very purpose of shifting the burden of proof as to whether a weapon was loaded and operable from the prosecution to the accused. Originally Section 160.15 of the Penal Laws of 1965 and 1967 drew a legitimate distinction between those who commit robberies with loaded, operable weapons and those who do so with weapons which are unloaded or inoperable, and properly placed the burden of proof on the distinguishing factors squarely with the prosecution. Then in 1969, it was amended to create the present statute for the specific purpose of shifting that burden of proof to the defense.* Thus the

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* Respondent's assertion [Respondent's brief at page 11, footnote], that the statute was amended in 1969 "in order to clarify what was fast becoming an imbroglio" is simply incorrect.

A long line of cases interpreted the pre-1965 Penal Law as requiring the prosecution to show that the gun used in a robbery was capable of being fired in order to establish that it was a dangerous weapon. See, e.g., People v. Davis, 29 A.D.2d 556 (2nd Dept. 1967); People v. Ahmed, 27 A.D.2d 729 (1st Dept. 1967); People v. Gordon, 19 A.D.2d 828 (2nd Dept. 1963); People v. Dade, 15 A.D.2d 629 (4th Dept. 1961). Confusion as to the correct interpretation of the pre-1965 law may have been created, however, by the dictum in People v. Roden, 21 N.Y.2d 810 (1968), which suggested that the People need not prove that the gun used in a robbery is loaded.

[Continued following page]

Practice Commentary to Penal Law Section 160.15(4) states:

> The charge was designed to deal with a situation where a robber ... displays what appears to be a firearm but does not fire the weapon or is not immediately apprehended in possession of the weapon.
>
> Being "armed with a deadly weapon" is an element of robbery in the first degree.... This element will rarely, if ever, be established by the prosecution when the actor does not fire the weapon or the weapon is not immediately recovered. This is so because "deadly weapon" is defined as a "loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged" (§10.00[12]). A victim can only testify that the defendant pointed something at him that looked like a gun and unless the defendant fired it, cannot possibly testify whether or not it was loaded.
>
> The solution proposed by the 1969 bill was to add as an element of first and second degree robbery ... the display of "what appears to be" a gun. However, with respect to [first degree robbery], the provision affords the defendant an opportunity to fight his way out of a first degree conviction if he can prove that the gun was either unloaded or incapable of being fired.

New York imposes substantially more severe penalties for robbery in the first degree than for robbery in the second degree -- a maximum prison sentence of 25 years as

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The Penal Laws of 1965 and 1967, however, were absolutely clear. Robbery in the first degree was defined as forcible stealing by one "armed with a deadly weapon," and Penal Law Section 10.00(12) defined a deadly weapon as "any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged." If the People failed to prove that the firearm displayed was loaded and operable, and therefore a "deadly weapon," the defendant would be guilty of only robbery in the third degree. See, People v. Iglesias, 40 A.D.788 (1st Dept. 1972); People v. Fwilo, 47 A.D.2d 727 (1st Dept. 1975).

opposed to a maximum term of 15 years. By placing the burden of proof concerning the single fact which distinguishes the two degrees of robbery on the accused, the operation of Penal Law §160.15(4) can result in his conviction of the more serious crime and receipt of a more severe sentence when it is "as likely as not" that the firearm was inoperable and he therefore only deserved to be convicted of robbery in the second degree and sentenced accordingly. Thus, as Judge Frankel concluded, the "procedural arrangement" of the New York robbery statute, like that of the Maine homicide statute, transfers "a weighty burden of proof to the defendant," and thus, by failing to require the People to prove every element necessary to constitute the crime charged beyond a reasonable doubt, "denigrates the interests found critical in Winship."

The respondent's attempts to distinguish the New York robbery statute from the Maine homicide statute struck down in Mullaney reflect either a misreading of the Mullaney decision or an improper emphasis upon "formalism" rather than "substance."

First, the respondent argues that robbery under the New York statute is a single generic offense with different degrees, while murder and manslaughter are "generically different offenses." Thus, he urges, the Mullaney decision

should be applied only where a state seeks to falsely cast what are in reality two distinct offenses as but a single crime. [Respondent's brief at p.8]. That argument ignores the Supreme Court's explicit statement in Mullaney that it accepted as binding the Maine court's determination that murder and manslaughter under Maine law are "punishment categories of the single offense of felonious homicide" rather than two distinct crimes. Mullaney, supra, at 689 and 691. As Judge Frankel noted, "the matter is not to be resolved by manipulating 'elements' of offenses or determining whether we deal with a single crime or two." Thus the fact that robbery is a single crime with different degrees under New York law clearly fails to render the Mullaney decision inapplicable to it.

Next, respondent incorrectly asserts that the present case should be distinguished from Mullaney because the disparity in the sentences which can be imposed for robbery in the first degree (a maximum of twenty-five years' imprisonment) and robbery in the second degree (a maximum of only fifteen years) is not as great as the disparity possible under the Maine homicide statute. In Winship, however, a sentence of only eighteen months with a maximum possible extension of four and a half years was involved. Thus, as in Mullaney, the interests found to be critical in Winship are "implicated to a greater degree in this case than they were in Winship itself." Mullaney, supra, at 700.

Finally, respondent incorrectly characterizes the affirmative defense provision of the New York robbery statute as a "presumption" which merely requires the accused to "present some evidence" to rebut it [Respondent's brief at pp.16-17], rather than as a provision which shifts the ultimate burden of persuasion to the defense. Respondent then argues that the statute should be upheld according to an application of standards traditionally applied to presumptions -- a "rational connection" between the fact proved and the fact presumed, and the "comparative convenience" of proof on the disputed issue [Respondent's brief at pp.14-17]. Again, the respondent's argument ignores the Supreme Court's statements in Mullaney. In the very footnote upon which the respondent grounds his argument, the Court pointed out that schemes which shift the burden of persuasion to the accused "obviously place . . . a greater strain" upon him than do presumptions (which require that he come forward with some evidence in rebuttal, but leave the ultimate burden of persuasion of the prosecution). Therefore, "the Due Process Clause demands more exacting standards." Mullaney, supra, at 702, fn. 31.* Moreover, in applying such "more exacting standards" to the Maine homicide statute, the Supreme

* The article which the Supreme Court cites in footnote 31, and upon which the respondent so heavily relies, also distinguishes carefully between true presumptions, which involve no shifting of the burden of proof, and what it terms "assumptions," which shift the burden of proof in the same manner as the creation of an affirmative defense. The authors conclude, as did the Supreme Court, that far more exacting standards are required when a shift in the burden of proof is involved. Ashford and Risinger, Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale Law Journal 165 (1969).

Court specifically rejected the type of argument urged upon this Court by the respondent -- that if the defense has easier access to evidence on an issue, shifting the burden of proof on it from the prosecution to the defense is permissible -- when it found that "although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not . . . justify shifting the burden to him." Mullaney, supra, at 702. Thus the New York statute's scheme which -- like that of the Maine homicide statute -- actually shifts the burden of proof to the defense, cannot be judged as if it were merely a rebuttable presumption.

Contrary to respondent's argument, the Supreme Court's dismissal of the appeal in People v. Felder, 39 A.D.2d 373 (2nd Dept.), aff'd. 32 N.Y.2d 747, appeal dismissed 414 U.S. 948 (1973), for want of a substantial federal question does not require this Court to hold the New York robbery statute constitutional. Since the challenge to the robbery statute in Felder was grounded in the privilege against self-incrimination rather than the Fourteenth Amendment right of due process, the dismissal in Felder was never dispositive of the due process issue. Furthermore, the landmark decision in Mullaney represents a significant doctrinal development that eradicated any precedential value that the prior dismissal of Felder may have had.

In Hicks v. Miranda, 422 U.S. 332,343-345 (1975), which the respondent cites in his brief at page 9, the Supreme Court declared that its dismissal of an appeal for want of a substantial federal question is an adjudication on the merits which is binding upon the lower federal courts. It is necessary to determine, however, what issues have been properly presented in the dismissed case and declared to be without substance. As the Supreme Court noted in Hicks, at 345, note 14, "ascertaining the reach and content of summary actions may itself present issues of real substance. . . ." For the lower court to adopt the broadest possible implications of the dismissal may render an injustice to the litigant. See Wagner v. Lind, 389 F.Supp. 213,216 (S.D.N.Y. 1975); Note, The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda, 76 Colum. L.Rev. 508, 532-33 (1976).

The issue actually adjudicated in Felder was whether the New York robbery statute violated the Fifth Amendment's guarantee against self-incrimination, although the jurisdictional statement in that case and the appellant's brief also made reference to the Fourteenth Amendment and the shift in the burden of proof. An examination of the Appellate Division opinion in Felder [39 A.D.2d 373 (1972)], upon which

the New York Court of appeals affirmed [32 N.Y.2d 747 (1973)], makes clear that the constitutionality of the robbery statute was considered in terms of the privilege against self-incrimination rather than in terms of the right to due process:

> [The defendant] contends that subdivision 4 of the section 160.15 of the Penal Law is unconstitutional because it creates a presumption of guilt and thus would compel him to be a witness against himself. [39 A.D.2d at 375].
>
> * * *
>
> The question of whether permitting the exercise by a defendant of his right to establish as an affirmative defense that the gun displayed by him in the commission of a robbery was not loaded or capable of causing death or serious physical injury would violate his constitutional privilege against self-incrimination has never heretofore been determined in this State. [39 A.D.2d at 378]
>
> * * *
>
> In short, although subdivision 4 of section 160.15 of the Penal Law offers the defendant a difficult choice, the statute does not contravene the Fifth Amendment of the Constitution of the State of New York, as the vice of compulsion is lacking. The People must still establish every element of the substantive crime. The defendant is offered the opportunity to assert an affirmative defense, but is not forced to do so, and therefore is not compelled to be a witness against himself. There is therefore no constitutional infirmity in the affirmative defense provisions of section 25.00 and 160.15 (subd. 4) of the Penal Law.
>
> [39 A.D.2d at 379]

Thus, since the challenge to the robbery statute in Felder was not grounded upon the Fourteenth Amendment claim presented in this case as to whether the State may shift to the

defendant the burden of disproving an element of the crime, Felder has no bearing upon petitioner's challenge to the statute.

Even, however, if the dismissal in Felder could have been viewed as controlling precedent at one time, it can no longer be so considered after Mullaney. The Mullaney decision is precisely the type of new "doctrinal development" which, as the Supreme Court noted in Hicks at page 344, abrogates the rule that lower federal courts "had best adhere to the view that if the court has branded a question as unsubstantial, it remains so." Courts and commentators have repeatedly noted that Mullaney represents an important doctrinal development, which is applicable both to affirmative defenses in general [see, e.g., Evans v. State, 28 Md. App. 640,349 A.D.2d 300 (1975), aff'd. _____Md. ___, Docket No. 173 (July 15, 1976); Note, Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant, 64 Georgetown L.J. 871 (1976)], and to New York State's affirmative defenses in particular [See R. Soriano, The New York Penal Law's Affirmative Defenses after Mullaney v. Wilbur, 27 Syracuse L. Rev. 834 (1976)].

Thus, as an important doctrinal development which treated the issue of due process and the shifting to the defense of the burden of proof on an element of the crime

charged on the merits, the Mullaney opinion certainly overrides any precedential value of Felder. See Hicks, supra, at 344-345; Mercado v. Rockefeller, 502 F.2d 666 (2nd Cir. 1974). See also Edelman v. Jordan, 415 U.S. 651,671 (1974).*

The respondent contends that petitioner's standing to challenge the constitutionality of the New York robbery statute is "cast in doubt" because of his failure to rely upon the affirmative defense that the gun was unloaded or inoperable at trial, and his reliance instead upon a defense of mistaken identity [Respondent's brief at p.7, footnote]. Petitioner, however, is clearly injured as a result of the denial of due process embodied in the New York robbery statute -- the test of standing set forth in Voeller v. Neilston Warehouse Co., 311 U.S. 531,537 (1941), and Ashwander v. TVA, 297 U.S. 288, 347-348 (1936), the cases respondent cites. In the absence of any proof as to whether the gun used in the robbery was loaded or operable, petitioner would stand convicted

* The mere fact that Maine's first petition for certiorari in Mullaney was filed prior to the Supreme Court's dismissal of the appeal in Felder is of little significance. It is not unusual for the Supreme Court to overrule a summary reversal after a plenary consideration of the underlying substantive issue. See H.M. Hart & H.Wechsler, The Federal Courts and the Federal System, 649 (2d ed. 1973); Port Authority Bondholders Pro. Com. v. Port of New York Authority, 387 F.2d 259,262-63 n.3 (2d Cir. 1967). This occurs because in practice Supreme Court Judges treat appeals from state court decisions in a manner similar to that accorded petitions for certiorari [Hogge v. Johnson, 526 F.2d 833,836 (4th Cir. 1975) (Clark, J., concurring)] and because plenary review (and especially oral argument) may have a crucial impact upon the outcome of the case. See Justice Brennan, quoted in Note, Hicks v. Miranda, supra at 526-27.

only of robbery in the second degree under a constitutionally permissible allocation of the burden of proof; instead he stands convicted of robbery in the first degree. Furthermore, although petitioner did not raise the affirmative defense through offering proof as to whether the gun was loaded or operable, he specifically moved at trial for a dismissal of the charge of robbery in the first degree at the close of the People's case because they had failed to prove that the weapon used was loaded or operable, and in addition requested a jury charge which would have properly placed the burden of proof on that issue upon the prosecution.

Finally, the respondent asserts that Mullaney should not be applied retroactively, since the shifting of the burden of proof to the defense via an affirmative defense does not "affect the integrity of the fact-finding process," or present a "clear danger of convicting the innocent" [Respondent's brief at p.18, footnote]. On the contrary, as the Supreme Court noted in Mullaney, such a shifting of the burden of proof does present the danger of convicting an accused of an offense when it is "as likely as not" that he is innocent of that offense and deserves conviction and punishment only for a lesser crime. Mullaney, supra at 703. Since Mullaney was based upon In re Winship, 397 U.S.358 (1970), and Winship was given retroactive effect in Ivan v. City of New York, 407 U.S. 203 (1972), Mullaney should be given retroactive effect as well. See People v. Patterson, 39 N.Y.2d

288,296 (1976); People v. Davis, 49 A.D.2d 437,443-444 (4th Dept. 1975); United States v. Regan, 525 F.2d 1157,1160 n.3 (3rd Cir. 1975).

Since Penal Law Section 160.15(4) improperly relieves the prosecution of its constitutional burden to prove every element of the crime charged beyond a reasonable doubt, petitioner's conviction was obtained in violation of his right to due process under the Fourteenth Amendment. Therefore, Judge Frankel correctly held that the statute was unconstitutional and granted the petition, and his order should be affirmed.

CONCLUSION

SECTION 160.15(4) OF THE NEW YORK PENAL LAW SHOULD BE DECLARED UNCONSTITUTIONAL, AND THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
WILLIAM J. GALLAGHER
Attorneys for Petitioner-Appellant

LYNN W. L. FAHEY
Of Counsel